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**FILED**

DISTRICT COURT OF GUAM

MAR - 9 2006

MARY L.M. MORAN  
CLERK OF COURT

**UNITED STATES OF AMERICA**

**DISTRICT COURT OF GUAM**

UNITED STATES OF AMERICA

Plaintiff,

vs.

CHRISTOPHER M. ESPINOSA, and  
BRIAN WILLIAM ELM,

Defendants.

Criminal Case No. CR-05-00016 *ESJ*

**DEFENDANT BRIAN WILLIAM ELM'S  
MOTION FOR SEVERANCE**

**\* \* \* MOTION FOR SEVERANCE \* \* \***

COMES NOW Defendant BRIAN WILLIAM ELM, through his counsel, VAN DE VELD SHIMIZU CANTO FISHER by Curtis C. Van de veld, Esq., to move the court to sever Defendant from trial with the other Defendant CHRISTOPHER M. ESPINOSA. This motion is made under FRCrP Rule 14 and is supported by the law and facts more fully set forth in the memorandum of points and authorities hereinafter set forth.

**\* \* \* MEMORANDUM OF POINTS AND AUTHORITIES \* \* \***

**STATEMENT OF FACTS**

ORIGINAL

1 Defendant is presently charged under a *THIRD SUPERSEDING INDICTMENT* with  
2 the offenses of Count 1 – Conspiracy To Distribute Methamphetamine Hydrochloride which  
3 states:

4 Beginning at a time unknown, but at least in or about the month of June 2004,  
5 through on or about June 18, 2005, in the District of Guam and elsewhere, the  
6 defendants, CHRISTOPHER M. ESPINOSA and BRIAN WILLIAM ELM, and other  
7 persons known and unknown to the grand jury, did unlawfully, intentionally, and  
8 knowingly combine, conspire, confederate and agree together with others, to distribute  
9 over 50 grams of methamphetamine hydrochloride, a schedule II controlled substance,  
10 in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A)(viii), and  
11 846.  
12

13 The substance of Count 2, relates only to codefendant CHRISTOPHER M.  
14 ESPINOSA, and charges *Possession With Intent To Distribute Methamphetamine*  
15 *Hydrochloride*.

16 Count 3 charges *Money Laundering Conspiracy* stating:

17 Beginning in or about June, 2004 and continuing thereafter to in or about June 18,  
18 2005, more exact dates being unknown to the Grand Jury, in the District of Guam, the  
19 defendants CHRISTOPHER M. ESPINOSA and BRIAN WILLIAM ELM, together  
20 with others known and unknown to the Grand Jury, knowing that the property  
21 involved in financial transactions represented the proceeds of a specified unlawful  
22 activity, did knowingly and intentionally combine, conspire, confederate and agree  
23 together and with each other to conduct such financial transactions affecting interstates  
24 and foreign commerce, which transactions in fact involved the proceeds of unlawful  
25

1 activity, namely, possession with intent to distribute methamphetamine hydrochloride,  
2 in violation of Title 21, United States Code, Section 841 and conspiracy to possess  
3 with intent to distribute methamphetamine hydrochloride, in violation of Title 21,  
4 United States Code, Section 846; with the intent to promote the carrying on of said  
5 specified unlawful activity, in violation of Title 18, United States Code Section  
6 1956(a)(1)(A)(i).

7 All in violation of Title 18, United States Code, Section 1956(h).

8  
9 Counts 4 to 7, allege *Money Laundering* charges for four (4) events occurring between  
10 April 12, 2005 and June 9, 2005, solely against codefendant CHRISTOPHER M. ESPINOSA.

11 Counts 8 to 19 allege *Money Laundering* charges against Defendant BRIAN  
12 WILLIAM ELM, for activities occurring between October 13, 2004 and February 25, 2005.

13 In the March 1, 2006 transcript of the grand jury proceedings, the testimony provides:

14 Q Did there come a point in time when Mr. Elm was no longer associated?

15 A Yes.

16 Q And what were the circumstances surrounding that?

17 A Mr. Elm, on or about March of 2005, was incarcerated due to an unrelated  
18 charge of firearm violation, and I believe drug violation.

19 So at that point, prior to Mr. Elm becoming incarcerated, he had instructed Mr.  
20 Aponik to assume his role within the organization, including the, again, acquisition of the ice  
21 that had been sent from Mr. Canovas as well as the return of the monies to Mr. Canovas once  
22 the drugs had been sold.

23  
24 Q And then later on during this conspiracy, Mr. Aponik was dealing directly with  
25 Mr. Espinosa?

1 A That's correct.

2 The December 7, 2005 transcript of the proceedings before the grand jury states:

3 Q Did there come a point in time when Mr. Elm was no longer involved in this  
4 activity?

5 A Yes.

6 Q Can you tell the Grand Jury about that?

7 A Yes. According to Mr. Aponik, at approximately January or February of 2005,  
8 Mr. Elm was arrested on an unrelated firearms violations charged here on Guam.

9  
10 Prior to his incarceration, Mr. Elm had – in not so many words, transferred his  
11 position in the organization to Mr. Aponik. Mr. Aponik then assumed all of the  
12 responsibilities of not only receiving the ice personally on Guam from Mr. Canovas, who's  
13 located in Las Vegas, but also responsible for directly sending the money back to Canovas  
14 once Mr. Cruz had distributed it.

15 As to charge 1, the government has submitted for use a Special Verdict form which  
16 requires that the jury determine the quantity level of drugs for which each defendant shall be  
17 held responsible. In its proposed Jury Instructions, the government has not provided for any  
18 instruction for the jury to determine when a person became a member of a conspiracy or when  
19 the person is no longer responsible for the ongoing actions of the conspiracy.  
20

21 ARGUMENT

22 FRCrP Rule 14 provides:

23 If it appears that a defendant ... is prejudiced by a joinder of offenses or of a  
24 defendants in an indictment or information or by such joinder for trial together, the  
25 court may order an election or separate trials of counts, grant a severance of

1 defendants or provide whatever other relief justice requires. In ruling on a motion by a  
2 defendant for severance the court may order the attorney for the government to deliver  
3 to the court for inspection *in camera* any statements or confessions made by the  
4 defendants which the government intends to introduce in evidence at the trial.

5 To be entitled to relief of severance, a defendant must show that the joinder of the  
6 offense or defendants is so prejudicial that it outweighs the interests of judicial economy and  
7 efficiency. United States v. Douglass, 780 F.2d 1472, 1478 (9<sup>th</sup> Cir. 1986).

8  
9 Whether as a result of the exercise of prosecutorial discretion or due to an objective  
10 determination that the facts fail to support the charges, the government has elected to charge  
11 the defendants with acts of criminal conduct occurring at differing times. The transcripts and  
12 charges seem to suggest that the government does not intend to hold defendant responsible for  
13 acts occurring after his incarceration on other charges. The government's failure to provide  
14 instruction for the jury to decide when the person became a member of the conspiracy and  
15 when his involvement ended, suggests that the time periods for which each defendant was  
16 involved embodies the time for the money laundering charges. Hence, joinder of defendants is  
17 prejudicial as it is likely to mislead the jury as to the time frames involved in the conspiracy  
18 charges Counts 1 and 3.

19 Additionally, the discovery provided to defense counsel indicates that the evidence  
20 against Defendant ESPINOSA may involve activities occurring in Las Vegas, separate and  
21 apart from those involved in the conspiracy alleged in this case, which relate to that  
22 codefendant's activities with another former codefendant, Jonathan Canovas. The evidence  
23 about their activities in Las Vegas may erroneously effect the determination of the extent to  
24 which Defendant Brian ELM should be held responsible, if at all. As the charges as set forth  
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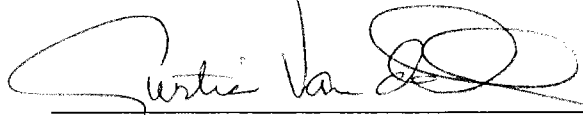
1 in the Indictment are largely separate as to each Defendant and the extent of the evidence as to  
2 those matters not relevant as to one of the Defendants as opposed to the other, the likelihood  
3 of causing prejudicial confusion of the jury is high.

4 CONCLUSION

5 The court should order the trials of the defendants to be severed.

6 DATED: 09 March 06.

7 **VAN DE VELD SHIMIZU CANTO & FISHER**

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9  
10 Mr. Curtis C. Van de veld, Esq.  
11 Attorney for Defendant  
12 BRIAN WILLIAM ELM